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Supreme Court, U.S.
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No. 03-484

In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Respondents have raised a new issue in their briefs in opposition to the petition: whether the petitioner properly presented and preserved its federal claims below. The issues were preserved because (I) they were raised at the time and in the manner required by state law and (II) the state appellate court rendered an unexpected interpretation of state law.

I.

Petitioner Properly Presented its Federal Claims to the State Appellate Courts and the Courts Improperly Ignored Them

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court reviewed a First Amendment argument presented by the appellants over the objection of the appellees that the appellants had "not met their burden of showing that it was raised in the state courts." *Id.* at 85 n.9. The Court held it "is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, '[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'" *Id.* (citation omitted).

The Court found that although the appellants had appealed to the California Supreme Court on the basis of their assertion that the appellees could not invoke a provision of the California Constitution to override their

constitutionally protected property rights under the Fourteenth Amendment, the appellants adequately raised an alternative First Amendment argument in the California Supreme Court by responding to an amicus curiae brief submitted to the California Supreme Court. *Id.*

In the instant case, the petitioner repeatedly asserted its federal rights in the trial court, *see* Petition at 5-8, argued as its primary ground for reversal that "Chapter 2001-1 is Unconstitutional," and fully explained the basis for the invalidity of the state law under the First Amendment and Equal Protection Clauses of the federal Constitution, citing primary cases from this Court that it relies on here for reversal of the decision upholding the constitutionality of the statute at issue. (R. App. 31).

Notwithstanding the presentation of these federal issues to it, the trial court authored an opinion that expressly addressed solely the parallel state constitutional law issues that had been raised before it. By ignoring the federal issues, the state trial court implicitly and necessarily decided, however, the federal issues presented to it by upholding the constitutionality of the statute at issue and applying that statute. In the court of appeals, the petitioner again expressly raised its federal claims in its brief on the merits. Petition at 12-13. Respondents acknowledge that in the state appellate court petitioner expressly "refers to [*Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999)] (the principal decision upon which it bases its petition to this Court)," but initially contends that petitioner's federal claims were not properly presented because they were not "identified in the required 'statement of issues' on appeal." Earnhardt Response at 11. They were not identified in the "statement

of issues" because the Florida Rules of Appellate Procedure do not require an appellate brief to contain a "statement of issues," *see* Florida Rule of Appellate Procedure 9.210(b) (setting forth the contents required for an initial brief), and the petitioner's initial brief correctly did not include any statement of issues.

If the respondents are referring to the "table of contents" that is required for the initial brief as a "statement of issues," then the respondents have overlooked the heading of the initial point of the argument section: "Chapter 2001-1 is Unconstitutional." That heading then is followed by an argument section that explains:

> The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state

> university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

(R. App. 31). Respondents assert that this did not properly present the argument to the Fifth District Court of Appeal of Florida because the argument was made in a footnote rather than in the text of the brief, citing *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996), and *Kauffman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958). The former decision held, ironically in footnote, that "It is elementary that arguments which are *not made as a point of appeal*, as here, but are *found only in a footnote in the appellant's brief*, are not properly presented to the appellate court for review." 672 So. 2d at 41 n.1 (emphasis added). As shown above, Campus Communications' initial point on appeal was that "Chapter 2001-1 is Unconstitutional." The argument is identified as a point on appeal and is not found only in a footnote but in the primary heading over the initial argument for reversal. Florida appellate courts do not require the full text of

every argument to be reflected in the heading of an argument.

As important, the *Engle* decision is not binding in the Fifth District Court of Appeal, *see Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) (decisions of sister courts are not binding on each other), and the Fifth District Court of Appeal never has held that issues presented in footnotes are not properly presented for review. Other district courts of appeal regularly have reviewed issues placed before them in footnotes.[1] *Engle* cited a decision of another district court of appeal, *Florida Association of Nurse Anesthetists v. Dep't of Professional Regulation, Board of Dentistry*, 500 So. 2d 324 (Fla. 1st DCA 1986), for the proposition that issues raised in footnotes will not be considered, but in that case the appellate court simply refused to consider an issue that was raised for the first time in a reply brief. It made no suggestion that appellate courts should ignore the footnotes of briefs.

The Florida Supreme Court's decision in *Kauffman* similarly does not support the proposition for which it is cited by the respondents. In that case, the Court declined to consider an argument that was raised in a footnote but not because the argument was raised in a footnote. The

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[1] *See, e.g.*, *Washington v. State*, 765 So. 2d 101 (Fla. 4th DCA 2000) (considering and deciding on motion for rehearing argument "referenced in footnote six of [appellant's] initial brief"); *Jean Fluet, Inc. v. Harrison*, 652 So. 2d 1209, 1211 (Fla. 1st DCA 1995) (considering and deciding argument presented "by a footnote in [appellant's] brief"); *Fla. Auto. Dealers Indus. Beneficial Trust v. Small*, 592 So. 2d 1179, 1181 n.3 (Fla. 1st DCA 1992) (considering and deciding on rehearing issue although "only reference to the . . . issue in appellant's initial brief appeared in a footnote").

Court declined to consider that argument because it did not point the Court to the evidence in the record upon which it relied. Instead, it asserts simply that the evidence "'clearly demonstrates the failure of consideration.'" 100 So. 2d at 803 (quoting brief). Quite properly, the Florida Supreme Court there held that "Such an offhand reference does not properly present for determination by this court the propriety of any ruling the chancellor may have made in this phase of the controversy." *Id.* By contrast, the argument advanced by the petitioner's in this case, when considered together with the detailed statement of the facts below, clearly demonstrated that the trial court had applied the statute at issue to condition access to public records on the speech of the petitioner. The brief demonstrated that the trial court had inquired into why the petitioner sought access to the records and, upon learning that the records would be used to question the accuracy of public statements made by NASCAR officials regarding the cause of Earnhardt's death, decided that the records would not be made available to the petitioner. Petitioner's argument showed that this violated principles established by decisions such as *United Reporting*.

II.

The State Appellate Court Rendered an Unexpected Interpretation of State Law

The *PruneYard* decision also recognized a second, independent basis for recognizing and deciding the First Amendment issues presented by the appellants: the California Supreme Court had surprised the litigants by failing to follow its own state law precedents that had been favorable to the appellants' position. This explained why the appellants had not placed greater emphasis on the

federal grounds before the California Supreme Court – they had had an independent and adequate state law ground for affirming the trial court decision. The *PruneYard* Court observed: "[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." 447 U.S. at 85 n.9 (citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). The California Supreme Court did that in *PruneYard* by overruling one of its prior decisions that had recognized the state constitutional right relied upon by the appellants.

The Fifth District Court of Appeal also abruptly reversed its interpretation of Florida constitutional law when it held that the statute at issue met the requirements of article I, section 24(c) of the Florida Constitution.[2] In *Halifax Hospital Medical Center v. News-Journal Corp.*, 701 So. 2d 434 (Fla. 5th DCA 1997), the Fifth District expressly had declared unconstitutional under article I, section 24 of the Florida Constitution an exemption to the Florida Public Records Law that suffered from

[2] The Fifth District Court of Appeal of Florida, for purposes of this case, "was shown to be the highest court of the state in which a decision could be had" when the Florida Supreme Court declined to exercise its discretionary jurisdiction. *See Am. Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

the same type of overbreadth that is found in the statute here for review.[3]

The Florida Supreme Court then affirmed that decision. *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999). Application of the *Halifax* decision to the facts of this case would have required invalidation of the statute at issue on state constitutional law grounds. *See* R. App. 33-40 & 82-94. Instead of applying *Halifax* or distinguishing it, the trial court, the Fifth District Court of Appeal, and the Florida Supreme Court simply refused to acknowledge the *Halifax* decision. The federal arguments for reversal of the trial court's order were completely unnecessary at the time that petitioner appealed to the Fifth District Court of Appeal and the Florida Supreme Court. Those arguments became

[3] Article I, section 24(a), Florida Constitution, provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(c) prohibits enactment of any exemption that is "broader than necessary to accomplish the stated purpose of the law." The exemption at issue in *Halifax* applied both to records that would serve the purpose of the exemption, allowing public hospitals to compete fairly with private hospitals, and those that would not, and was therefore void. The Florida Legislature adopted the exemption applicable to the Earnhardt autopsy photographs to protect the "immediate family members of the deceased" from emotional distress. Ch. 2001-1, § 2, Laws of Fla. The exemption applies not only to new autopsy photographs of persons with living close relatives who might by distressed by public access to the photographs, but also to decades-old, previously public autopsy photographs of persons long deceased who have no living relatives. The exemption therefore should have been declared void under the Florida Constitution, but was not.

necessary only after the Fifth District Court of Appeal refused to follow its own precedent and the Florida Supreme Court refused to review the case. Petitioner nevertheless presented the federal arguments to both the Fifth District Court of Appeal and the Florida Supreme Court as alternatives to its main arguments in order to ensure that those arguments would be preserved. Under the *Prune-Yard* decision, of course, it was not even necessary to do this. The issues are regarded as adequately presented simply because the state appellate courts altered the independent Florida law grounds for a decision for petitioner in ruling on the appeal.

Finally, the Court should consider that some of the arguments raised by the petition are based on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297, 2310 (2003), after the Fifth District Court of Appeal had rendered its decision in July 2002. The petitioner had no opportunity to challenge the constitutionality of the statute at issue on the basis of the views expressed by four Justices in *American Library Association* that removal of information from state libraries on the basis of its content must be subjected to strict scrutiny, because the case had not yet been decided. At a minimum, the decision of the Fifth District Court of Appeal should be vacated for reconsideration in light of that decision.

CONCLUSION

The petitioner properly preserved its claims for review by this Court and a writ of certiorari should be granted.

Dated: November 5, 2003

Respectfully submitted,

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